

No. 83-1510

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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DONALD FERGUSON & JOSEPH FERGUSON, PETITIONERS

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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## TABLE OF AUTHORITIES

Page

### Cases:

<i>Backo v. Local 281, United Bhd. of Carpenters</i> , 438 F.2d 176, cert. denied, 404 U.S. 858 .....	3
<i>Branzburg v. Hayes</i> , 408 U.S. 665 .....	3, 4
<i>Costello v. United States</i> , 350 U.S. 359 .....	3
<i>Grunnewald v. United States</i> , 353 U.S. 391 .....	4
<i>Shillitani v. United States</i> , 384 U.S. 364 .....	3
<i>United States v. Calandra</i> , 414 U.S. 338 .....	3
<i>United States v. Handler</i> , 476 F.2d 709 .....	3
<i>United States v. Kissel</i> , 218 U.S. 601 .....	4
<i>United States v. Mandujano</i> , 425 U.S. 564 .....	3, 4
<i>United States v. Petito</i> , 671 F.2d 68 .....	3
<i>United States v. Walker</i> , 653 F.2d 1343, cert. denied, 455 U.S. 908 .....	4

### Statutes:

18 U.S.C. 6001 <i>et seq.</i> .....	2
26 U.S.C. 6531 .....	4

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## **MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioners claim that the orders holding them in civil contempt for refusing to testify before the grand jury must be set aside because the statute of limitations has since run on the offense that was the principal subject of the grand jury's investigation.

1. On October 26, 1978, the disbursing officer on the *U.S.S. Dixon*, a submarine tender that was berthed in San Diego, California, was assaulted and some \$197,000 in currency was stolen from the ship's safes (C.A. App. 62).<sup>1</sup> In June 1981, the Federal Bureau of Investigation received information from a confidential informant that implicated petitioners and two others, Terry Lee Smith and Stuart

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<sup>1</sup>"C.A. App." refers to Appellee's Supplemental Excerpt of Clerk's Record filed in the court of appeals.

Lester, as the robbers. In April 1982, a second informant gave more detailed information concerning the same suspects (*ibid.*).

In July 1982, all four men, responding to subpoenas issued by a federal grand jury in the Southern District of California, agreed to be photographed and fingerprinted by the FBI and to furnish hair samples (*ibid.*). On October 3, 1983, additional grand jury subpoenas were served upon the four men, specifically calling for them to appear before the grand jury in order to testify. On October 12, 1983, the United States District Court for the Southern District of California issued orders granting use immunity to the witnesses and compelling their testimony, pursuant to 18 U.S.C. 6001 *et seq.* (C.A. App. 1-21). Notwithstanding the court's order, petitioners refused to testify and they were subsequently held in civil contempt (Pet. Supp. App. 1-4, 5-8).<sup>2</sup>

On October 27, 1983, petitioners moved to quash the contempt orders on the ground that the statute of limitations had expired for the offense under investigation (C.A. App. 104-108). The district court denied the motions, and the court of appeals affirmed by order (Pet. App. 22-25).

2. Petitioners claim (Pet. 9-20) that the orders holding them in civil contempt must be vacated because the running of the statute of limitations with regard to the crime of robbing the *U.S.S. Dixon* has effectively terminated the grand jury investigation, and with it, any further public necessity for their testimony. Recognizing that no court has ever endorsed this novel assertion, petitioners rely on cases holding that once the grand jury has been discharged, a

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<sup>2</sup>Stuart Lester also refused to testify, despite a grant of immunity, based on his assertion of an attorney-client privilege. Lester was held in contempt, but the court of appeals reversed his conviction (Pet. App. 23-25).

judgment of civil contempt must be vacated because the contemnor has lost the power to purge himself of contempt by complying with the court's order to testify. *Shillitani v. United States*, 384 U.S. 364, 371-372 (1966); *United States v. Petito*, 671 F.2d 68, 72 (2d Cir. 1982); *United States v. Handler*, 476 F.2d 709, 715 n.7 (2d Cir. 1973); *Backo v. Local 281, United Bhd. of Carpenters*, 438 F.2d 176, 182 (2d Cir. 1970), cert. denied, 404 U.S. 858 (1971). By analogy to these cases, petitioners argue that the running of the statute of limitations has terminated the authority of the grand jury to investigate the robbery of the U.S.S. DIXON, and therefore that their testimony may no longer be compelled.

Petitioners' attempt to limit the authority of a continuing grand jury is flatly inconsistent with the scope of the grand jury's power as repeatedly recognized by this Court. See *United States v. Mandujano*, 425 U.S. 564, 571 (1976); *United States v. Calandra*, 414 U.S. 338, 344 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972); *Costello v. United States*, 350 U.S. 359, 362 (1956).<sup>3</sup> This is not a

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<sup>3</sup>In *United States v. Calandra*, 414 U.S. at 343, the Court reaffirmed the breadth of the grand jury's power:

The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 282 (1919).

\* \* \* \* \*

Furthermore, a witness may not interfere with the course of the grand jury's inquiry. He "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is

case like those cited by petitioners in which the grand jury has been discharged and its duties actually ended. Here the grand jury is still in session<sup>4</sup> and is therefore still empowered to continue its investigation into the "broader problems of concern to society." *United States v. Mandujano*, 425 U.S. at 573.

The grand jury's inquiry is not at a close merely because the statute of limitations has run on the robbery offense. The grand jury is entitled to pursue every available clue and examine every witness in order to determine whether any additional crimes have been committed with respect to the events surrounding the robbery of the *U.S.S. Dixon*. *Branzburg v. Hayes*, 408 U.S. at 701. For example, it may well be that the robbers failed to declare or pay the required income tax on the money stolen from the *U.S.S. Dixon*. The statute of limitations on tax violations is six years and has therefore not yet run. 26 U.S.C. 6531. Similarly, the robbery might have been part of a broader conspiracy or scheme that continued after the robbery. The statute of limitations would not begin to run until the conspiracy or scheme terminated. *Grunewald v. United States*, 353 U.S. 391, 397 (1957); *United States v. Kissel*, 218 U.S. 601 (1910); *United States v. Walker*, 653 F.2d 1343, 1345-1350 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982). It is therefore clear that the grand jury has a continuing power and obligation to investigate the events surrounding the robbery of the *U.S.S. Dixon*. Accordingly, there exists a continuing "public interest" in having petitioners testify

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no concern of his." *Id.* at 282. Nor is he entitled "to challenge the authority of the court or of the grand jury" or "to set limits to the investigation that the grand jury may conduct." *Ibid.*

<sup>4</sup>The term of this particular grand jury has been extended until November 1984.

before the grand jury, and petitioners are still capable of complying with the district court's order by testifying. Accordingly, they are still in contempt of the court's order.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE  
*Solicitor General*

MAY 1984